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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1314

WILLIAM GREEN CONSTRUCTION CO., INC.

and

UNITED STATES FIDELITY AND GUARANTY COMPANY,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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William Green Construction Company, Inc., (hereafter referred to as "Green") and United States Fidelity and Guaranty Company (hereafter referred to as "USF&G") cross-petition for a writ of certiorari to review the judgment of the United States Court of Claims in this case. This cross-petition is conditional upon the granting of the petition for writ of certiorari filed by the Government in this case on January 26, 1974 (No. 73-1153). Green and USF&G

have filed a brief in opposition to that petition, and in the event that petition is denied, they shall seek dismissal of this petition.

OPINION BELOW

The opinion of the Court of Claims is reported at 477 F.2d 930. The Court of Claims' Order denying the motions of the parties for reconsideration is unreported. For convenient reference, petitioners' complaint is attached to this cross-petition (App. I, *infra,* pp. 1a-16a).

JURISDICTION

The opinion of the Court of Claims was entered on May 11, 1973, and the respective motions for reconsideration were denied on September 28, 1973. On January 3, 1974, the Chief Justice extended the time within which to file a cross-petition for a writ of certiorari to February 25, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1255.

QUESTIONS PRESENTED

The questions presented are:

1. Whether, in view of Green's administrative appeal from the termination of the Howard University contract and the Board of Contract Appeals' dismissal of the breach of contract portion of that appeal, the Court of Claims erred in requiring Green to return to the Board of Contract Appeals for exhaustion of administrative remedies.

2. Whether a breach of the payments clause by the Government is cognizable under the disputes clause of the contract thereby requiring all issues of

liability and damage to be determined administratively?

3. Whether a termination for convenience clause or concept can be employed to exculpate the Government from the full extent of the damages it has wrongly imposed where the contractor (1) was not in default and (2) where the Government desires or needs completion of the contracted-for facilities?

(4) Whether the damages alleged in the Petition are, as a matter of law, nonrecoverable, notwithstanding that such damages are provable and notwithstanding that the Government had actual knowledge that such damages would be the inevitable result of its wrongful acts and, in spite of that knowledge, arbitrarily proceeded with such wrongful action?

(5) Whether the Government's general right of set-off entitles the Government to set-off nonmeritorious claims arising out of the Government's own wrongful conduct, without responsibility for the consequences of the unjustified set-off?

STATUTE INVOLVED

The Wunderlich Act, 68 Stat. 81, 41 U.S.C. §§ 321-322, provides as follows:

> § 321. Limitation on pleading contract-provisions relating to finality; standards of review.
>
> No provision of any contract entered into by the United States, relating to the finality or conclusiveness of any decision of the head of any department or agency or his duly authorized representative or board in a dispute involving a question arising under such contract, shall be pleaded in any suit now filed or to be filed as limiting judicial review

of any such decision to cases where fraud by such official or his said representative or board is alleged: *Provided, however,* That any such decision shall be final and conclusive unless the same is fradulent [sic] or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence.

§ 322. Contract-provisions making decisions final on questions of law.

No Government contract shall contain a provision making final on a question of law the decision of any administrative official, representative, or board.

STATEMENT

Petitioners in this action seek damages for losses directly caused by the Government's breach of contracts entered into with Green. USF&G was the surety on the performance and payment bonds on two of these contracts.

The facts pertinent to the issues are set forth in the petition initiating this action and, of course, those facts must be accepted as true for purposes of a motion to dismiss which the Government filed in the Court of Claims and on which that Court rendered its opinion in this case. Briefly stated, the facts are: In November 1964, the Government and Green entered into a contract in the amount of $1,899,138 for the construction of a women's residence hall at Howard University in Washington, D. C. (hereafter referred to as the "Howard contract"). At approximately the same time, these parties also entered into a contract in the amount of $2,340,583 for the construction of a United States Post Office and Federal

Office Building in Portsmouth, New Hampshire (hereafter the "FOB contract"). Subsequently, these parties signed a third contract in the amount of $8,556,150 for the construction of the National Training School for Boys in Morgantown, West Virginia (hereafter the "Training School contract"). USF&G was the surety on the Howard University and FOB contracts.

After award of the contract and for 16 months thereafter, Green attempted to perform the Howard contract but was unable to make substantial progress because the plans and specifications for the cast-in-place architectural concrete (CPAC) work, which was critical to performance of the contract, were defective and impossible to perform. Green made repeated requests of the Government during this time for changes in the plans and specifications to permit the work to proceed, but these requests were rejected even though the Government had a duty under law to make the changes necessary to permit the work to proceed if they were defective. The Government disagreed that its plans and specifications were defective, and by letter of April 14, 1966, its contracting officer advised Green that its right to proceed with the Howard University contract was thereby terminated for default on the ground that Green had failed to proceed in accordance with that contract. Green had been able to complete only 13.5% of the contract work during the preceeding 16 months. Green filed a timely appeal from the default termination with the General Services Board of Contract Appeals (GSBCA).

The Government almost immediately advised Green that it was going to set-off all of its contin-

gent claims for damages, liquidated and unliquidated, arising from the Howard termination, against progress payments earned by petitioner Green on the FOB and Training School contracts. This was a surprising position for the Government to take and obviously one with far reaching implications because:

1. The Government was already secure from any potential loss on Howard. It was holding contract balances of about $1,640,000 and a performance bond of $1,899,138 with USF&G as surety, providing total security of $3,539,138 to assure completion of the Howard contract, if it could be performed at all in accordance with the plans and specifications.

2. Green did not have the capital resources to continue performing contracts of the magnitude of FOB ($2,340,583) and Training School ($8,556,150) without the benefit of unimpaired progress payments. It already had contracted for all the materials, equipment and labor necessary to perform the $12,795,871 in work represented by the Howard, FOB and Training School contracts, and those obligations which were in the millions of dollars had to be satisfied regardless of whether the Government paid Green. Moreover, the major part of Green's business was involved with these three contracts and the lack of progress payments on FOB and Training School contracts meant the destruction of Green's business because of the very large contractual commitments that it had made with materialmen and subcontractors for the performance of work required by the contracts with the Government.

3. The FOB and Training School contracts were being satisfactorily performed by Green and it was

inconceivable that the Government (i) would knowingly commit an act damaging to its own interest by causing an unnecessary default of the FOB and Training School contracts with their attendant delays and added costs, and (ii) would knowingly commit an act that meant the destruction of Green's business.

Urgent meetings were held with the Government in an attempt to resolve the matter. During these meetings Green and USF&G advised the Government that the default termination had been improper; and that if the Government pursued its indicated intention to set off the excess completion costs and liquidated damages under the Howard University contract against Green's FOB and Training School contracts, this action would make it financially impossible for Green to proceed with completion of these other contracts. Green and USF&G specifically stated to the Government that the inevitable result of any such set-off would be the forced abandonment of the FOB and Training School contracts and the destruction of Green's entire business.

In light of the above facts, Green and USF&G requested the Government to isolate the Howard University dispute and agree not to set off its contingent damage claims, liquidated and unliquidated, or excess completion costs against Green's other federal contracts. Green advised the Government that as long as there were no set-offs of Howard University claims against proceeds earned under the other contracts, it was willing and able to complete satisfactorily those contracts.

Although an agreement to isolate the Howard University dispute would not have prejudiced the Gov-

ernment because of the security afforded by the Howard contract balances and USF&G's performance bond, and despite the Government's full knowledge of the inevitable consequences of a decision to set off the Howard University claims, the Government nevertheless refused to agree not to set-off the disputed claims. The Government likewise refused petitioners' request to withdraw the Howard University termination notice and to modify the Howard University contract specifications, or interpretation thereof, in order to eliminate the elements of impossibility and the underlying dispute. As a result of the Government's action, Green was compelled to abandon the FOB and Training School contracts and was forced out of business.

Green promptly amended its Howard default termination appeal pending before the GSBCA to include claims for damages incurred for breach of the FOB contract and for those arising from the destruction of its business. The Government subsequently filed with the GSBCA a motion to dismiss the amended appeal for lack of jurisdiction on the ground that it was a claim for "breach of contract" and "unliquidated damages" and, as such, was "not redressable under any clause of the contract." By decision dated February 20, 1968, the Board of Contract Appeals granted the Government's Motion in part by dismissing that part of Green's claim for the damages which are the subject of the petition before this Court. The Board held that "we have no jurisdiction over that part of the appellants' claim which is for unliquidated damages for breach of contract as that is a so-called 'pure' breach of contract claim, i.e. a claim not redressable under a specific

contract provision. See *U.S.* v. *Utah Construction and Mining Company,* 384 U.S. 394; *Dean Construction Co., Inc.,* GSBCA-1050, 65-2 BCA para. 4888." *Wm. Green Constr. Co.,* 68-1 BCA ¶6883.

The Howard, FOB and Training School contracts were eventually completed by others than Green. The assuming contractor on Howard also found the structure impossible to build in accordance with the specifications and the Government then made the changes necessary to allow completion, which it should have done as a matter of law years before. Confronted with evidence of the most compelling kind, the Government on October 8, 1971, entered into a stipulation in which it admitted:

> "1. That the contractor was not in default at the time it received notice of the termination and the Government concedes the termination for default was erroneously made by the Contracting Officer. The appeal, therefore, should be granted as defined by the prior decisions of the Board in this case."

On the basis of the Government's admission of liability, the Board granted the appeal on October 13, 1971, and set aside the wrongful default termination of the Howard University contract. *Wm. Green Constr. Co.,* 71-2 BCA ¶9117. The Board's order stated in part:

> "The Board treats the Stipulation, in part, as the Government's admission that the contractor was not in default, within the meaning of the Default clause of the contract, at the time the contract was terminated for default. Accordingly, the Board finds that the appellant's right to proceed under the contract was improperly terminated for default."

Accordingly, the Board remanded the appeal to the contracting officer to determine Green's entitlement (i.e., equitable adjustment) for unreimbursed costs incurred in performing the Howard University contract. Recognizing the Board's earlier dismissal of Green's claim for damages which are the subject of the present petition, both the Government's stipulation and the Board's order provided:

> "That any equitable adjustment under the contract shall not be prejudicial to appellant's right to proceed in the Court of Claims for additional damages not the subject of such equitable adjustment."

At issue here is the question of the Government's responsibility for direct, natural, and foreseeable damages which the GSBCA held to be nonredressable under any specific contract clause, but which, nonetheless, are the direct and proximate result of the Government's breach of the Howard University contract and its anticipatory breach of the FOB and Training School contracts. This case is unique in that the result of the Government's wrongful termination of the Howard University contract coupled with its intransigence on the set-off question, was precisely as forewarned by Green and USF&G when they expressly advised the Government that the impending set-offs would render completion by Green of the FOB and Training School contracts financially impossible and that, therefore, Green would have no choice but to abandon work on those projects and cease business.

The direct, natural and foreseeable result of the Government's wrongful actions was to cause Green substantial losses. First, as a result of Green's forced

abandonment of the FOB contract the Government required USF&G, as surety for that contract, to complete performance and pay all valid and outstanding claims for labor and materials under that contract. The costs and losses thus incurred by USF&G totaled $870,969.59, for which Green, under its indemnity agreement, is liable to USF&G in the full amount. Second, by reason of the forced abandonment of the FOB and Training School contracts and the wrongful termination of the Howard University contract, which contracts represented more than one half of Green's total business, Green was deprived of the cash flow necessary to continue its business, its capital and credit were destroyed and it was forced to discontinue its business as a general contractor. This resulted in rendering Green unable to complete three other contracts which it was then in the process of performing. USF&G, as surety for those contracts, was required to complete performance and to pay all valid and outstanding claims for labor and materials under those contracts. The costs and losses incurred by USF&G on those contracts amounted to $948,753.44, for which Green under its indemnity agreement is liable to USF&G in the full amount. Finally, as a direct and provable result of the Government's breaches of contract, Green lost the full value of its business, which had a net worth of $890,334.26.[1]

As a result of the foregoing events, Green and USF&G filed their action in this case alleging breach of the Howard University contract (Count I) and anticipatory breach of the FOB contract (Count II).

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[1] The petitioners made no claim for anticipatory profits, and the Court of Claims erred on that fact in its opinion.

The Government filed a motion to dismiss in the Court of Claims, alleging among others, a failure by Green to exhaust its administrative remedies. This is a direct contradiction of the position the Government took on the same issues before the GSBCA, where it moved to dismiss these same issues because they involved a breach of contract and were not cognizable administratively under any provision of the contract. Thus, this case is in the posture of the Government's taking contradictory positions in different forums for its own advantage to the prejudice of the petitioners and being permitted to succeed with it. Before the Administrative Board, which has no jurisdiction over breach of contract issues, the Government said the issues are breach of contract claims not cognizable under the contract and the Board has no jurisdiction of the issues.[2] The GSBCA agreed and dismissed petitioners' claims which are the subject of the present action. *Wm. Green Constr.* Co., 68-1 BCA ¶6883. In the Court of Claims, which has no *de novo* jurisdiction of claims cognizable under the contract, the Government contended the issues were cognizable administratively under the contract and that Green was required to exhaust administrative remedies. In its opinion, the Court of Claims agreed and remanded the case back to the GSBCA.

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[2] The Government was most specific in its motion to dismiss before the GSBCA:

> "• • • [T]he Board does not have jurisdiction over all factual disputes, but only over those that have some reasonable bearing on a claim which is redressable under a specific contract provision • • •. [W]e submit that *Appellant's claim is not redressable* under any clause of the contract." (Emphasis added.)

REASONS FOR GRANTING THE WRIT

The Government has filed a petition for a writ of certiorari, No. 73-1153, to review the decision of the Court of Claims in this case. Green and USF&G have filed an opposition to the Government's position. However, this petition is filed to request review of the entire decision, including those issues decided adversely to Green and USF&G, in the event this Court should grant the Government's petition.

I. The Lower Court's Holding That There Is An Adequate Administrative Remedy Is Contrary To Established Law.

In *S&E Contractors, Inc.* v. *United States,* 406 U.S. 1 (1972), this Court held that "a citizen has the right to expect fair dealing from his Government * * * and this entails in the present context treating the Government as a unit rather than separate entities." 406 U.S. at 10. The question of whether Green had exhausted its administrative remedies is one that the Government could have raised at the administrative level. Since it chose not to do so, but chose instead to take the position before the administrative tribunal that the claims were breaches of contract not redressable administratively, the Government should not be allowed to raise an exhaustion of administrative remedies issue in the Court of Claims and the Court of Claims should not have remanded the case to the GSBCA. In doing so, the Court of Claims not only ignored the teaching of *S&E Contractors, Inc., supra,* but struck across its own holding in *Nager Electric Company* v. *United States,* 184 Ct.Cl. 390, 396 F.2d 977 (1968), which estopped the Government from claiming a failure to exhaust administrative remedies because the parties had characterized the claim before the Administrative Board

as a "breach" claim. This is exactly what occurred before the GSBCA in the present case. *Wm. Green Constr. Co.*, 68-1 BCA ¶6883. The unavailability and inadequacy of any administrative remedy was established by the GSBCA's decision and that satisfies the holding of this Court in *United States* v. *Anthony Grace and Sons*, 384 U.S. 424 (1966).

In treating the Howard and FOB contracts as tied together for purposes of set-off, and thus inextricably tying the wrongfulness of the Howard termination to the refusal to make progress payments under FOB, the Government should not be allowed now to change its position under any view of the case.

II. Adequate Administrative Remedies Were Not Available To The Contractor, So That The Court Of Claims Should Have Treated This Case As A Breach Of Contract Case.

When the Government breaches the payments clause of the contract, the contractor's traditional and judicially recognized remedy has been to abandon the contract and sue for damages.[3] This is exactly what Green did. Moreover, it is well understood law that the "disputes clause" does not extend to breach of contract claims "not redressable under other specific contract provisions." *United States* v. *Utah Constr. & Mining Co.*, 384 U.S. 394 (1966). There is no contract provision providing a remedy for the Government's repudiation of its payment obligation. This was specifically recognized by the Court of Claims in *Sanders Assoc.* v. *United States*, 191 Ct.Cl.

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[3] *Canal Company* v. *Gordon*, 73 Wall. 561 (1867); *Pigeon* v. *United States*, 27 Ct.Cl. 167 (1892); *Brooklyn & Queens Mfg. Co.* v. *United States*, 97 Ct.Cl. 532 (1942); *Valley Contractors*, 64 BCA ¶ 4071 (ASBCA 1964); *Pilcher, Livingston & Wallace, Inc.*, 70-1 BCA ¶ 8331 (ASBCA 1970).

7, 423 F.2d 291 (1970), where it held that a breach
the payments clause fell within the *Utah* excep-
on as not redressable under other provisions of the
ntract. Furthermore, that Court in *Universal Ecsco*
rp. v. *United States,* 181 Ct.Cl. 10, 385 F.2d 421
967) allowed a contractor to prosecute a claim for
each of the progress payment clause and rejected
e Government's contention that the claim was bar-
d by failure to exhaust administrative remedies.

By remanding the case to the GSBCA, the Court
Claims for the first time subordinated a breach of
e payments clause to the disputes clause of the
ntract. That result creates an open invitation for
e economic ruin of contractors and exposes them
duress of the utmost kind, for the common law
ght of contractors to abandon the work is now lost
d there is no other meaningful restraint upon an
use of bureaucratic power. This arises because the
sputes clause provides that "Pending final decision
a dispute hereunder, the contractor shall proceed
ligently with the performance of the contract and
accordance with the contracting officer's decision."
us, if the Government arbitrarily refuses to pay a
ntractor, the contractor is obligated under the dis-
tes clause to proceed with the work regardless of
at the Government has done, receiving only the
bious right to resort to administrative procedures
collect his money, which usually takes years. To
bject a breach of the payments provision to the
ministrative procedures of the disputes clause will
destructive not only of contractors but of the Gov-
ment's procurement processes, because few con-
ctors have the resources to perform work without
y or only partial pay and the endurance to engage

in a prolonged contest with the Government to collect it, and those which do would avoid doing business with the Government under such conditions or would contract with it only at exorbitant prices.

In an effort to provide some adjustment for the injustices sustained by the petitioners, the Court of Claims applied a termination for convenience concept to this case, and remanded it to the GSBCA for a convenience termination. But Green plainly was not in default and just as plainly the Government needed the completion of the contracted-for facilities. This raises for serious consideration by this Court the applicability for a termination for convenience clause in situations where (i) a contractor is not in default and (ii) the Government desires and needs the completion of the contracted for facilities. It would open the door to great mischief, if the Government can, under the guise of a termination for convenience clause, breach at will contracts that are not in default for facilities that it needs and which are completed subsequently by others.

III. The Government's Announcement That It Would Refuse To Make Progress Payments Was An Anticipatory Breach Of Contract.

The Court of Claims rejected Count II (App. 15a) which is based upon anticipatory breach of the FOB contract, as "a choice of phrasing to camouflage the irrefutable fact that the only detriment which came, or could come, to plaintiffs would be through a wrongful default-termination." The fact is that Green abandoned the FOB contract thereby terminating it as a viable agreement. The Court of Claims disregards the established law to achieve its

holding. The rule regarding anticipatory breaches of contract is firmly established and "a definite and unconditional repudiation of the contract by a party thereto, communicated to the others, is a breach of contract, creating an immediate right of action and other legal effects, even though it takes place long before the time prescribed for the promised performance and before conditions specified in performance have occurred." 4 Corbin, *Contracts* §959 at 852-53. In *United States* v. *Purcell Envelope Co.*, 249 U.S. 313, 320 (1919) this Court held that this doctrine applies fully to anticipatory repudiation of a contract by the Government. In that case, the Court, citing *Roehm* v. *Horst*, 178 U.S. 1 (1900), stated: "It is there decided that the positive refusal to perform a contract is a breach of it, though the time for performance has not yet arrived, and that liability for the breach at once occurs." *Id* at 320. Moreover, the Court of Claims has held that a Government refusal to make further progress payments constitutes an anticipatory breach creating an immediate cause of action. *Overstreet* v. *United States*, 55 Ct.Cl. 154 (1920); *Whitback* v. *United States*, 77 Ct.Cl. 309 (1933). The Court of Claims erred, therefore, in failing to apply the applicable law of anticipatory breach of contract.

V. The Measure Of Damages For Breach Of Contract Should Include Compensation for Provable, Foreseeable Consequential Damages, Contrary To The Court of Claims' Holding

The Court of Claims summarily dismissed all claims for consequential damages of Count I, holding that they were "too remote and consequential." This holding contravenes the established common law as